IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 793

L. P. STEUART & BRO., INC., *Petitioner*,

v.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, ET AL.

PETITIONER'S REPLY BRIEF.

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INTRODUCTION.

Because of the short period of time between the granting of the writ and the hearing, coupled with the wartime shortage of help and curtailing of printing services, it was impossible for counsel for either the Petitioner or the Respondents to prepare and file briefs within the time prescribed by the rules. The result is that Petitioner was served with a proof of the proposed brief of the Respondents on April 25, 1944, less than a week before the hearing and only three days from the time a brief must be in the hands of the printer if the Petitioner's reply brief is to be filed by the time of the hearing.

Counsel for Petitioner, therefore, are adopting the expedient of filing a brief which confessedly is incomplete; and trust that this Court will not only forgive its obvious defects of form and expression but realize that lack of time has prevented it from being complete. It is the purpose of this reply brief merely to stress a few of what counsel believe to be

fundamental errors in the Respondents' method of solution of the question before the Court, and to point out the consequences following upon these errors.

SUMMARY OF ARGUMENT.

In their presentation of the facts, Respondents have failed to observe their stipulation that for the purposes of this case facts well pleaded by any party should be considered as true; have treated as facts statements set forth in exhibits, namely, certain findings of the Hearing Administrator, merely because the Petitioner has not denied them in its complaint (although the issues do not call for denial of such statements); and have, without the foundation of a pleading, treated as definitely established facts matters not appearing in the record and not found by the administrative officers. The result has been an attempted creation of an atmosphere wherein the Petitioner would appear to be a ruthless malefactor and wherein the suspension order, instead of being penal, is a mere deprivation of illegal gains.

The necessity of inquiry as to whether the suspension order prescribed by Procedural Regulation 4 and issued in this case is penal cannot be avoided because of the fact that "penalty" is a word of wide meaning, and that precision can be attained only by linking the term with the proceeding or liability sought to be characterized by it. There are many instances in the law where legal terms have variable meanings, dependent upon the circumstances in which they are used and the relation or proceeding under inquiry.

Whether or not suspension orders defined by Procedural Regulation 4 are penal is not determined by the state of mind of particular Hearing Administrators or Hearing Commissioners.

The congressional ratification claimed by the Respondents lacks both of two necessary elements, first that the statute be

ambiguous, and second that the interpretation be of long standing or notorious. It further falls afoul of the rule that interpretation cannot supply omissions.

ARGUMENT.

I.

Errors in Presentation of the Facts.

The first error in the factual presentation is an oversight either of the stipulation set forth in the judgment of the District Court or of the consequences of the stipulation. The judgment (R. 62-63) contains the following recitation:

> "Upon said hearing plaintiffs and defendants moved orally for summary judgment upon the ground that there were no material issues of fact to be tried *and all parties consented that for the purpose of this case all material facts well pleaded in either pleading be taken as true;* that there is no claim *in the complaint* that there was no substantial evidence to support the order of the Hearing Administrator, and that the order to be entered herein be a final one upon said oral motions of the parties." (Italics supplied)

The above-quoted excerpt of the judgment shows what took place in these proceedings. No evidence was taken. The motion for summary judgment was the equivalent of a general demurrer at common law or a motion to dismiss in equity under the old rules. At all times in this case celerity of final adjudication has been deemed essential and the above-quoted excerpt from the judgment was inserted by both parties to expedite the appeal, to make known to the Appellate Courts the fact that this case was not disposed of on questions of evidence, and to obviate the delay incidental to preparing findings of fact.

In the face of the stipulation referred to in the judgment and the obvious consequences attendant upon an oral motion for judgment unaccompanied by affidavit or tendered issue of

fact (that is, that the averments of the adversary pleading must be treated as true), the Respondents have asserted, as facts, matters not appearing in their pleadings and now seek to deny or question the existence of facts which their stipulation admitted. Their brief is replete with examples of ignoring the consequences of the stipulation and the motion for summary judgment.

One of these examples occurs in Footnote 10 on Page 9 of the Respondents' brief, reading as follows:

> "Although petitioner claims it made a large investment in additional facilities prior to the heating season of 1942-1943 (R. 2), according to its own declaration its fuel oil storage capacity at the end of the season was only 16,850 gallons (R. 42). Petrol Corporation, prior to its suspension for violations, including sales to petitioner without coupons, had a storage capacity in Washington of at least 3,405,810 gallons (R. 42). Petitioner did not contend, and we are confident was not able to contend, that these facilities have been idle."

The above-quoted footnote is for the obvious purpose of denying a fact well pleaded in the complaint. It is illustrative of the vices inherent in attempting to avoid the necessary effect of a stipulation or of a motion for judgmnet on the pleadings, namely, that all facts well pleaded by the adversary must be conceded to be true. For this reason it will be analyzed in some detail, to demonstrate the effects following upon the vice. Had the Petitioner been called upon to prove the averments obliquely denied by the footnote above quoted, it could have shown the fact that Petitioner has storage facilities for 5,000,000 gallons of fuel oil, which immediately prior to the heating season of 1942-43 were leased to its supplier, Petrol Corporation; that Petitioner and Petrol Corporation canceled the lease in the summer of 1943, and the 5,000,000 gallon capacity of storage is now not only owned but possessed by the Petitioner.

Petitioner could further show by indisputable proof that among its storage facilities were those for 80,000 barrels of

distillate fuel oil or Bunker "C" fuel oil, equipped with steam coils to permit of ready transfer of storage facilities from distillates to bunker and, in addition, 50,000 barrels of storage space for Bunker "C" fuel oil. It could show that Petitioner's plant was designed and equipped with a tank car siding capable of unloading forty-two tank cars at one shift (the approximate equivalent of two full train lots in twenty-fours) and that it is the only terminal in the District of Columbia qualified as to its ability and capacity to store and handle the volume of fuel oil handled by it. In proof of the existence of these facilities and of their vital necessity to the Government it could supply correspondence from the Government's own files, among them a letter from Robert E. Allen, Assistant Deputy Petroleum Coordinator, to the Reconstruction Finance Corporation, setting forth most of the above facts in connection with a proposed loan by the Reconstruction Finance Corporation, and stressing the fact that the facilities were

> "most essential to the solution of the petroleum supply problem which confronts this nation in the affected areas of the Atlantic Seaboard and with particular emphasis on the District of Columbia and the Army requirements adjacent to this territory."

The footnote further failed to explain why the Petitioner's declaration of fuel oil storage capacity set forth only 16,850 gallons, although the reason is well known to the Respondents. The reason is that Petrol Corporation, being the lessee of the storage facilities, declared them. The figure 16,850 gallons quoted in the footnote was the capacity merely of the Petitioner's delivery trucks. The statement,

> "Petitioner did not contend, and we are confident was not able to contend, that these facilities have been idle,"

is sufficiently answered by calling the attention of the Court to the fact that the suspension order has never been made effective by reason of the temporary restraining order obtained at the outset of the litigation.

The above factual statements made by Petitioner are not made for the purpose of proving the averments of the complaint. They are made merely for the purpose of illustrating the gross injustice which can result when obliquely, and by innuendo, an impression is sought to be created at variance with the direct averments of pleadings, which at this posture of the case, are assumed to be true.

Another example appears on Pages 37 and 38 of the Respondents' brief. In referring to the allegations of the complaint as to the turnover in customers and lack of record as to cash customers in the pre-rationing year, the Respondents complain because these allegations are used as factual statements, and attempt to refute them. A perusal of Paragraph 9 of the complaint will show that the factual statements were well pleaded, and it must, therefore, be assumed that there is a turnover of approximately fifteen to twenty percent per year. Parenthetically, counsel for Respondents during the oral argument before the Court of Appeals admitted this to be a fact, generally. As to the lack of record of cash customers, again the fact is well pleaded that the Petitioner's records are incomplete for the pre-rationing year. The Respondents' brief, however, states on Page 38 as a fact that the administrative record shows Petitioner had a separate card in its files for each customer served, neglecting to state that the testimony therein referred to related to records kept since rationing went into effect. The Respondents further propose in their Footnote 31 on Page 38 a scheme for obtaining the names of the customers which would entail an examination of every application for fuel oil in the District of Columbia and vicinity. It is doubtful whether, under the regulations, a ration board would be permitted to allow a dealer to make such an examination of its files. Even if it could, the magnitude of such a task can be better imagined than described.

Again, on Page 41 of their brief the Respondents refer to an "expansion achieved through flouting ration rules." There is no such averment made by their answer. There is no such

statement made by the Hearing Administrator, or by the Hearing Commissioner. The result is that, without pleading or proof, an impression is attempted where the suspension order would seem to be merely the withholding from the Petitioner of ill-gotten gains. This is a contradiction of the facts averred in the complaint that:

> "The other retail fuel oil dealers serving the District of Columbia and vicinity failed and neglected to expand their facilities as requested by the Petroleum Administrator for War as aforesaid, and, by reasons of the plaintiff's compliance with the recommendations of the said Petroleum Administrator for War the plaintiff during the heating season of 1942-1943, was, and now is better able to serve the retail purchasing public, and the Government of the United States, with fuel oil than are the plaintiff's competitors."

Further, had the Respondents' answer made the averment that Petitioner's expansion was "achieved through flouting ration rules," Petitioner could have replied with the additional averment (which it could prove) that a cause for expanded business in addition to those set forth in the complaint was the purchase of a competitor's business, facilities and good will.

The second error consists of treating as facts findings of the Hearing Administrator merely because the Petitioner did not deny them in the complaint or say that they were unsupported by substantial evidence. In the first place, Respondents in their answer have not said either that the findings were true or that they were supported by substantial evidence. In *Wilemon, et al.* v. *Brown,* No. 854 in this Court (*Brown* v. *Wilemon,* 139 F. 2d 730) the record discloses that the Office of Price Administration in that case did at least aver that the Hearing Administrator's findings were based upon substantial evidence.

Inasmuch as the sole question is the statutory authority of the Office of Price Administration to entertain proceedings looking to the issuance of a suspension order, the validity of

the findings depends on the jurisdiction of the Office of Price Administration to entertain the proceedings and issue the order. This is not a proceeding to review the findings of the Hearing Administrator. If it were, the appropriate pleadings would have been made by both sides. Even in such a proceeding, moreover, the standards of review have not been authoritatively determined.[1] The fact that no standards of

[1] Respondents seemingly take the view that in a judicial review of the findings here in question, the facts found by a Hearing Administrator must be sustained if supported by substantial evidence. It is true that in review of many of the various administrative tribunals functioning under various statutes, that rule has been applied. However, it is by no means of universal application. The scope of judicial review depends largely on the statute creating the administrative agency or the statute which the administrative agency is to administer. Here, as in discussing penalties, the Respondents have utilized what is described in the Preface to Frankfurter and Davison's Cases on Administrative Law, as a horizontal view. The Respondents have fallen into the generalizations warned against in that Preface. The pertinent language of the Preface, subject to errors in rewriting from shorthand notes, is as follows:

> "Administrative law is groping; it is dealing with new problems, calling for new social inventions or fresh adaptations of old experiences. To be sure, administrative law is not a wholly new phenomenon. But in their range and permeating influence, we are dealing with new juristic forces. In a field as vast and unruly as is contemporary administrative law we must be wary against premature generalization and merely formal system. Administrative law is markedly influenced by the specific interests entrusted to a particular administrative organ, as well as by the characteristics in history, structure and enveloping environment of the particular organ of regulation. And so 'judicial review' is not a conception even tolerably well defined in scope, nor a process having substantially the same elements whenever courts review the action of administrative bodies. Therefore, the problems subsumed by 'judicial review' or 'administrative discretion' must be dealt with organically; they must be related to the implications of the particular interests that invoke a 'judicial review' or as to which 'administrative discretion' is exercised. In short, for the scientific development of administrative law, a subject like 'judicial review' must be studied not only horizontally but vertically; we must explore not 'judicial review' generally or miscellaneously, but 'judicial review' of Federal Trade Com-

review are fixed in the Act is, however, an indication that no such proceedings were contemplated by Congress.

In the present status of the case, however, authority or jurisdiction is the sole question. If the proceedings and the suspension orders were authorized, it is conceded that, until set aside on review, findings of fact therein made must be accepted. On the other hand, if the proceedings were not authorized they were of no effect whatever.[2]

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mission orders, 'judicial review' of postal fraud orders, 'judicial review' of deportation orders. 'Judicial review' in Federal Trade Commission cases, for instance, is affected by totally different assumptions, conscious and unconscious, from those which govern courts when reviewing orders of the Interstate Commerce Commission. Likewise 'judicial review' in postal cases is under the sway of the whole structure of which it forms a part, just as 'judicial review' in Land Office cases or in immigration cases derives significance from the agency which is reviewed not less than from the nature of the subject matter under review.

"One cannot, therefore, stress too much the tentative stages of hypothesis and generalization in administrative law, and the predominant importance of knowing the anatomy and physiology of the lawmaking agencies that are neither legislature nor courts but partake of the functions of both. * * *"

[2] This rule, although of long standing, is not obsolete. It was reiterated on April 10, 1944, by the United States Court of Appeals for the District of Columbia in *Rowe* v. *Nolan Finance Company*, No. 8573, decided April 10, 1944. The *per curiam* opinion of the Court follows:

"PER CURIAM: Appellant filed a complaint in the District Court in which she alleged that she had borrowed $262.80 from appellees on a note and had given a deed of trust on an automobile as security; that this transaction was fraudulent and usurious; and that appellees seized the car upon appellant's default in a payment on the note. Appellant demanded damages in an aggregate amount of $2,000, an order that appellees disclose the state of the account between the parties, and an injunction against sale of the car. The court rightly dismissed the complaint on the ground that the amount in controversy was not sufficient to give the court jurisdiction. Suits "in which the claimed value of personal property or the debt or damages claimed" does not exceed $3,000 are now in the exclusive jurisdiction of the Municipal Court for the District of Columbia. D. C. Code (1940, Supp. II) § 11-755, 56

The third type of error in the factual presentation consists of treating as definitely established facts, without the foundation of averments in a pleading, matters neither appearing in the record, nor found by the administrative officers. Perhaps the most glaring example of this occurs on Pages 6 and 7 of the Respondents' brief wherein they refer to the finding by the Hearing Administrator of the receipt by Petitioner of 5,548,972 gallons of fuel oil without surrendering to its supplier any ration coupons, exchange certificates, or the like. It is true the Hearing Administrattor made such a finding. Not content with this, however, the brief continues:

> "It was not a question of delay; Petitioner had never surrendered such coupons."

The impression is thereby made that the coupons were never surrendered. Had the coupons or other ration evidences been surrendered in the way prescribed by the regulations to Petitioner's supplier, Petrol Corporation, they would eventually find their way to the Office of Price Administration. It appears, however, that they must have been turned over directly to the Office of Price Administration. The Hearing Administrator states (R. 45):

> "When respondent's failure to give Petrol Corporation ration currency for fuel oil transfers came to the attention of the Enforcement Division and an investigation of respondent's activities became necessary, respondent turned over to the District Enforcement attorneys a number of cartons filled with unsorted fuel oil ration coupons of all denominations. Though requested by the Office of Price Administration to assist with these coupons, both in their count and in supervision of the count, respondent refused

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Stat. 192, ch. 207, § 4; *Klepinger* v. *Rhodes*, U. S. App. D. C. , F. 2d , decided February 11, 1944.

"Though the court dismissed the complaint for lack of jurisdiction, it undertook to make findings upon the merits. *These findings are without effect.* Dismissal is without prejudice to the enforcement in the Municipal Court of any claim which appellant may have." (Italics supplied.)

to do so. Under these circumstances the count was made by employees of the Office of Price Administration."

The delivery of the coupons to the attorneys for the Office of Price Administration took place in April or May of 1943. They were returned at the conclusion of the hearings before the Hearing Commissioner, with the statement that the Office of Price Administration had no further use for them. It is true that the Hearing Administrator found a delay in the surrendering of coupons far beyond that allowed by the regulations. It is further true that he found no facts in excuse. The inference, however, that they have never been turned over is absolutely unwarranted. The coupons were delivered to and audited by the Office of Price Administration.

II.

The Necessity of Inquiry as to Whether the Suspension Order Prescribed by Procedural Regulation 4 Is Penal Cannot be Avoided Because "Penalty" Is a Word of Wide Meaning

Both in the summary at Page 11 and in the argument at Page 27 the Respondents criticize inquiry as to whether a suspension order is penal in determining whether it is authorized. They take exception to endeavoring to define the concept of "penalty." Likewise, on Page 32 they take exception to the fact that Procedural Regulation 4 has been analyzed.

The difficulties encountered by the varied meanings of terms in the nomenclature of jurisprudence does not avoid the necessity of using them and applying them to particular situations. One of the most familiar examples which comes readily to mind is the word "fixture." Whether the law would characterize a particular article as a fixture in many instances depends on whether the conflicting claims are between landlord and tenant, between vendor and purchaser, or between heir-at-law and next-of-kin. The concept of a fixture is not limited by the physical characteristics alone.

The excerpt from the Preface of Frankfurter and Davison's Cases on Administrative Law quoted in Note 1, *supra*. 8, is appropriate here. Generalization is imprudent in defining "penalty" as well as attempting to make sweeping generalizations as to "judicial review." Compare the majority and concurring opinions in *United States ex rel Marcus* v. *Hess*, 217 U. S. 537, 548-552, 553.

The review and analysis of Procedural Regulation 4 made in the Petitioner's brief was for the purpose of supplying the vertical as well as the horizontal view to the question as to whether the suspension order is a penalty. It was an attempt to make known "the anatomy and physiology of the agency and the proceeding." It was, perhaps, ineptly done. But at least it avoided the dangers of sweeping generalization made by citing *Hawker* v. *New York*, *Nichols* v. *Secretary of Agriculture*, *Nelson* v. *Secretary of Agriculture*, and *Wright* v. *Securities and Exchange Commission*, as proof that no penalty was involved.

It is worthy of note that Respondents have not been able to supply in their brief an instance where a Court has ever held that a suspension order of the type here in question was so lacking in penal characteristics that authority to issue it could be implied.

III.

Whether or not Suspension Orders Defined by Procedural Regulation 4 Are Penal Is not Determined by the State of Mind of Particular Hearing Administrators or Hearing Commissioners

The citation of cases from the dockets of the Office of Price Administration, not appearing in the Federal Register or in a reporting service, is of little help. What may have been in the minds of various Hearing Commissioners or Hearing Administrators, whether expressed or unexpressed, is not determinative. Other Hearing Commissioners and other Hearing Administrators may well think differently.

If such authorities are cited to prove the proposition that

suspension orders are not penal, the testimony now being taken by a sub-committee of the House Interstate and Foreign Commerce Committee could be cited to the contrary. However, citing of instances where Hearing Administrators have been fair and citing of instances where they may have been unfair does not determine whether a suspension order as defined by Procedural Regulation 4 is penal. We must look to Procedural Regulation 4 itself. Under that regulation, suspension order proceedings are brought on a charge of violation and the suspension order by its definition is visited only upon one who has committed a violation.

IV.

The Necessary Elements of Congressional Ratification Are Lacking

In determining whether or not an interpretation has been ratified by Congress there are several well-known requirements.

The first is that the statute be ambiguous. Reliance by the Respondents on congressional ratification, therefore, displays a lack of confidence in the assertions in other portions of their brief that Congress expressly granted the right to withhold rationed commodities because of prior violations.

The second requirement is that the ratification be well-known either because the interpretation is of long standing or notorious. Admittedly, the administrative interpretation was not of long standing when the Second War Powers Act was passed. Respondents cite thirteen suspension orders issued by the Office of Production Management and the War Production Board prior to the presidential approval of the Second War Powers Act. However, only seven of them were issued prior to the time the Act passed the Senate and had been reported by the House Judiciary Committee. They could not have had the notoriety ascribed to them by the Respondents. If they had, the Attorney General would not have been forced to go back as far as the First World War for an illustration of a comparable administrative sanction. See Page 47 of Re-

spondents' brief. The only other "administrative interpretation" prior to the passage of the Act, consists of a sentence buried in a two-volume transcript of two thousand pages of hearings before the House Committee on Banking and Currency on H. R. 5479, 77th Cong., 1st Sess. (see Footnote 35, Page 45 of Respondents' brief). The statement was made before the House Committee on Banking and Currency which had before it neither the Priorities and Allocations Act of 1941 (House Naval Affairs Committee) nor the Second War Powers Act (House Judiciary Committee). The listing of examples of congressional knowledge set forth in the Respondents' brief speaks more eloquently of the poverty of means of knowledge than it does of knowledge. The Fifth Intermediate Report of the Select Committee to Investigate Executive Agencies, dated April 24, 1944 (House Report No. 1366), at Page 25, reviews similar arguments made before it by the Office of Price Administration and concludes:

> "Congress has been unaware that it has ratified the exercise of powers assumed by the Office of Price Administration in violation of legislative intent and Congress should now make its position clear."

The views of the members of the Petroleum Sub-Committee of the Interstate and Foreign Commerce Committee, House of Representatives, expressed in hearings currently taking place, and as yet unreported, indicate that the members of that Sub-Commitee do not believe Congress has ratified the interpretation of the Office of Price Administration.

CONCLUSION

Suspension orders as defined by Procedural Regulation 4 and of the type issued in the instant case have neither been authorized or ratified by Congress. The decision of the Court below should, therefore, be reversed.

Respectfully submitted,

RENAH F. CAMALIER,
FRANCIS C. BROOKE,
Counsel for Petitioner.

MEMORANDUM FOR THE UNITED STATES

FILE COPY

No. 1155

In the Supreme Court of the United States

October Term, 1944

L. P. Steuart & Bro., Inc., Petitioner,

v.

Chester Bowles, Administrator, Office of Price Administration, et al.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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PETITION FOR A WRIT OF CERTIORARI

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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 793

L. P. STEUART & BRO., INC., PETITIONER

v.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the District Court (R. 59–62) and the United States Court of Appeals for the District of Columbia (R. 66–71) are not yet officially reported.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on February 18, 1944 (R. 71–72). The petition for a writ of certiorari was filed in this Court on March 15, 1944. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the power granted the President by Section 2 (a) of the Act of June 28, 1940, as amended by the Act of May 31, 1941, and by Title III of the Second War Powers Act (Act of March 27, 1942), to allocate materials "in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense," includes the power to limit or withdraw an allocation of a dealer in rationed commodities because he has violated the conditions upon which he was permitted to participate in the allocation system.

STATUTES AND REGULATIONS INVOLVED

The case involves the Act of June 28, 1940 (54 Stat. 676), as amended by the Act of May 31, 1941 (Priorities and Allocations Act) (55 Stat. 236), and by Title III of the Second War Powers Act, 1942 (56 Stat. 176, 50 U. S. C. (Supp. II), sec. 631 et seq.). Section 2 (a) (2) reads, in part:

> * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

Sections 2 (a) (5) and (6) provide for criminal and civil enforcement suits against persons violating the Act or regulations and orders issued thereunder. Section 2 (a) (8) authorizes the President to exercise his powers through such agency or officer as he may direct and in conformity with rules which he may prescribe.

Ration Order No. 11, effective October 22, 1942 (7 Fed. Reg. 8480–8503, as amended), provided for the rationing of fuel oil. Section 1394.5707 required a dealer to surrender ration coupons or other ration evidence within five days after receiving a transfer from his supplier.[1] Section 1394.5652 required the receipt of valid ration evidence by a dealer delivering fuel oil to a consumer. Section 1394.5656 required the dealer to keep certain records of fuel oil sales. Section 1394.5803 provided:

> § 1394.5803. *Suspension orders.* Any person who violates Ration Order No. 11 may, by administrative suspension order, be prohibited from receiving any transfers or deliveries of, or selling or using or otherwise disposing of, any fuel oil or other rationed product or facility. Such suspension order shall be issued for such period as in the judgment of the Administrator, or such person as he may designate for such

[1] "Ration evidence" means a token authorized by the Office of Price Administration to represent a right to receive a transfer of a rationed good and exchangeable for such good subject to the conditions set forth in the Ration Order. For the five-day period, see 8 Fed. Reg. 1640; *cf. id.* 14817.

purpose, is necessary or appropriate in the public interest and to promote the national security.[2]

By Executive Order 9125 (7 Fed. Reg. 2719–2720) the President had conferred his power under Section 2 (a) (2) of the Second War Powers Act on the War Production Board and confirmed War Production Board Directive No. 1 (7 Fed. Reg. 562) which lodged in the Office of Price Administration certain of the Board's allocation power under the earlier acts. By supplementary Directive 1–0, the War Production Board had delegated to the Office of Price Administration specific authority over the rationing of fuel oil (7 Fed. Reg. 8418).[3] Ration Order No. 11 was then promulgated.

The Office of Price Administration conferred on its Hearing Commissioners and Hearing Administrator the function of issuing suspension orders. General Order No. 46 (8 Fed. Reg. 1771).

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[2] Effective March 2, 1943, this section was amended to read: "An administrative suspension order may be obtained in accordance with Procedural Regulation No. 4 against any person who violates Ration Order No. 11" (8 Fed. Reg. 2720).

[3] Directive 1–0 contained the following provision: "(b) The authority of the Office of Price Administration under this supplementary directive shall include the power to regulate or prohibit the sale, transfer, delivery or other disposition of fuel oil to, or the acquisition or use of fuel oil by, any person who has acted in violation of any rationing regulation or order prescribed by the Office of Price Administration." A similar provision was contained in Directive 1.

At the same time it adopted procedural regulations governing their issuance. Procedural Regulation No. 4 (8 Fed. Reg. 1744).

STATEMENT

Petitioner seeks review of a judgment of the Court of Appeals for the District of Columbia which affirmed the judgment of the district court (R. 62) granting respondents' motion for summary judgment, denying petitioner's motion for temporary injunction, and dismissing its complaint.

On January 7, 1944, the petitioner brought suit in the district court to enjoin enforcement of a suspension order issued by the Office of Price Administration on December 31, 1943, restricting the petitioner's dealings in fuel oil. Petitioner is a retail dealer in various kinds of fuel oil in the District of Columbia. On August 9, 1943, the Office of Price Administration commenced proceedings, under Procedural Regulation No. 4, to determine whether a suspension order should be issued against petitioner. A Notice of Hearing was served charging 227 violations of Ration Order No. 11 (R. 23). Pursuant to the Notice, a hearing was held on these charges before a Hearing Commissioner, terminating on October 22, 1943. On November 8, 1943, the Hearing Commissioner issued a suspension order (R. 32). Both sides appealed to the Hearing Administrator from the terms of this suspension. On Decem-

ber 31, 1943, after full argument and review, the Hearing Administrator issued his Decision on Appeal (R. 41). As the Court of Appeals noted (R. 67), petitioner's complaint does not deny that the evidence supported the findings of the Hearing Administrator. These findings must therefore be accepted as true.

The Hearing Administrator found that the petitioner had received transfers of 5,548,972 gallons of fuel oil without surrendering in exchange to its supplier, Petrol Corporation, any ration coupons, exchange certificates, or any other form of ration evidence (R. 43–44). This was clearly contrary to Ration Order No. 11, which required surrender of such evidence promptly.[4] It was not a question of delay; petitioner had never surrendered such coupons. In addition, the Hearing Administrator determined that upon comparison of all available counts of the coupons received by petitioner and the sales made by it, a shortage of coupons appeared representing approximately 181,000 gallons according to the petitioner's own calculation, and 328,640 gallons according to the Office of Price Administration's count, which showed that petitioner had not always received coupons in exchange for fuel oil delivered to its customers (R. 45–47).[5] He likewise found at least 13 instances admitted or proved where petitioner

[4] Section 1394.5707.

[5] This was contrary to Sec. 1394.5652 of Ration Order No. 11.

failed to receive valid ration coupons in exchange for fuel oil delivered (R. 47–48). Finally, the Hearing Administrator determined that the petitioner had failed to keep records showing the number and value of all coupons detached and received for fuel oil transferred to consumers (R. 48).[5] He determined that because of the demonstrated untrustworthiness or inability of petitioner to comply with the regulations while serving additional customers, a suspension order should issue.

The suspension order (R. 50–51) prohibited the petitioner from receiving fuel oil for resale or transfer to any consumer, and from transferring fuel oil to any consumer, from January 15, 1944, to December 31, 1944, but provided that if the petitioner should furnish the Office of Price Administration a list of consumers to whom it sold fuel oil from October 21, 1941, to October 21, 1942, and if it should surrender all void ration evidences in its possession, it might continue to receive deliveries of fuel oil sufficient for purposes of resale and transfer to consumers serviced by it between October 21, 1941, and October 21, 1942. The suspension order further provided for an accounting by petitioner of its fuel oil transactions. Finally, in paragraph (c), the order provided that if the Petroleum Administrator for War should certify to the Office of Price Administration that the fuel

[5] This was in violation of Sec. 1394.5656 of the Ration Order.

oil needs of the District of Columbia cannot be met by the supplies and facilities of other dealers and suppliers in the area, and that it is therefore essential to the welfare of the community that the provisions of the suspension be modified, the restrictions imposed might be modified by the Hearing Commissioner on the petition of the District Director of the Office of Price Administration and the petitioner.

The instant suit came on for hearing in the District Court, after respondents had filed an answer (R. 56), on petitioner's motion for a temporary injunction. All parties agreed that the case was controlled by issues of law and consented to disposition of the suit on oral motions of petitioner and respondents for summary judgment (R. 62). The district court ordered the complaint dismissed (R. 62), with an opinion holding that authority to issue the suspension order is included in the statutory power to make allocations (R. 59–62). The Court of Appeals unanimously affirmed (R. 67–71). A restraining order has been continued pending final disposition of the case.

DISCUSSION

The decision of the Court of Appeals in the instant case upholding the suspension order as a valid exercise of the allocation power and its like holding in another case[1] are in accord with the

[1] *Country Garden Markets* v. *Bowles*, App. D. C., March 6, 1944, not yet reported.

only other appellate decision, that of the Circuit Court of Appeals for the Fifth Circuit.[8] Nine United States District Judges in seven Districts have likewise sustained suspension orders.[9] With the exception of the opinions of the District Judge who was reversed by the Circuit Court of Appeals for the Fifth Circuit,[10] there is but one case which may be considered to the contrary, and that by way of a dictum or alternative holding.[11] The question presented is, however, of exceptional public importance. The wide use of the suspension order by a number of Government wartime agencies charged with the allocation function makes a challenge to its basic validity one of vital concern to the administration of the

[8] *Brown* v. *Wilemon*, 139 F. (2d) 730 (C. C. A. 5).

[9] *Perkins* v. *Brown*, 53 F. Supp. 176 (S. D. Ga.); *Pantelco* v. *Brown*, 53 F. Supp. 209 (S. D. N. Y.); *Joliet Oil Corp.* v. *Brown*, N. D. Ill., Dec. 17, 1943, not yet reported; *Gallagher Steak House* v. *Bowles*, S. D. N. Y., Dec. 23, 1943, not yet reported; *Kotson* v. *Ivins*, D. Utah, Jan. 12, 1944; *Arthur L. Means* v. *Bowles*, D. R. I., Jan. 17, 1944; *L. P. Steuart & Bro.* v. *Bowles*, D. D. Col., Jan. 21, 1944, not yet reported; *Country Garden Markets* v. *Bowles*, D. D. Col., Jan. 24, 1944, not yet reported; *Waldera et al.* v. *Bowles*, D. N. D., Jan. 25, 1944.

[10] Prior to reversal of the decision in *Wilemon* v. *Brown*, 51 F. Supp. 978 (W. D. Tex.), Judge Atwell had also decided *Jacobson* v. *Bowles*, 53 F. Supp. 532, which is now pending on appeal.

[11] *Sims* v. *Talbert*, 52 F. Supp. 688 (E. D. S. C.). *B. Simon Hardware Co.* v. *Nelson*, 52 F. Supp. 474 (D. D. Col.), involving a War Production Board suspension order, is a decision of Mr. Justice Bailey which, in upholding the suspension order in the present case, he termed inapplicable. The decision is being appealed.

Second War Powers Act.[12] For these reasons we do not oppose the petition.

We believe, however, that the nature of the controversy involved requires some clarification, in view of petitioner's insistence that the power in question is one of "licensing" or else a "penalty."

The decided cases have had a central theme overlooked by petitioner in its brief. Thus neither the District Court nor the Court of Appeals in the instant case has indicated that any license to do business or Governmental power to buy and sell forms the foundation for the suspension power. On the contrary, the suspension order was justified as an allocation away from a violator to those more trustworthy, or the withdrawal of an allocation.[13] The courts have likewise stressed that the statutory power to allocate on such conditions as are "in the public interest" and "promote the na-

[12] The War Production Board, the War Food Administration, the Petroleum Administration for War, and the Office of Price Administration have issued suspension orders under the Second War Powers Act. As of March 20, 1944, the War Production Board had issued 512 such orders. As of March 1, 1944, the Office of Price Administration had issued 9,007 such orders.

[13] Thus the Court of Appeals stated: "The suspension order is within the President's authority to 'allocate.' As the District Court observed, the power to allocate includes the power to reallocate, or to put an end to an allocation. All allocation has positive and negative aspects. What is allocated to some is allocated away from others. An order is equally an allocation whether it prescribes what A shall receive or, as in the case of this suspension order, what B shall not receive" (R. 68).

tional defense," authorizes the imposition of a condition that violation of the rationing rules will lead to a withdrawal of the allocation." Cf. Ration Order No. 11, *supra*, pp. 3–4.

Although the District Court and the Court of Appeals in the instant case did not use the analogy, some courts have pointed out that an allocation on condition is similar to a license or privilege in which rights do not vest.[15] Petitioner in its brief (pp. 12–17) seeks to characterize these cases as upholding the orders on the theory that the Second War Powers Act conferred a licensing power. Actually the Office of Price Administration has issued no license under its rationing authority. And it matters little to the position of the Government whether dealing in rationed commodities be termed a privilege or a conditional right. The important fact is that the terms of

[14] The Circuit Court of Appeals for the Fifth Circuit stated in the *Wilemon* case, at p. 732: "We do not think a penalty has been ordained or adjudged in such a sense as to require the action of Congress and a court; but that observance of rationing rules may as a matter of administration be made 'a condition' of participation in allocation, as mentioned in the Act * * *."

[15] The court in *Perkins* v. *Brown*, *supra*, observed, at p. 179: "The suspension order is itself an allocation. Rationed commodities are allocated away from the violator for a period deemed reasonable under the circumstances, and at the same time the amount actually or potentially allocable to other and more trustworthy recipients of rationed commodities has been increased. A distributor of gasoline may be likened to a licensee whose license runs during good behavior."

the suspension order are properly related to the carrying out of the allocation power.

Suspension orders are imposed not with the object of punishment but for the protection of the rationing system against waste and diversion. Such orders are not penalties in the legal sense and are nonetheless an allocation because they work a hardship or have a penalizing effect. *Hawker* v. *New York*, 170 U. S. 189, established that a statute which forbade persons convicted of a felony from practicing medicine did not increase the punishment for an offense already committed. The Court held that the statute merely prescribed a qualification for practice of the profession for the protection of the public. The Court rejected the applicability of *Ex Parte Garland*, 4 Wall. 333, and *Cummings* v. *Missouri*, 4 Wall. 277, relied on by petitioner (p. 18), noting that those cases held unlawful test oaths as to past conduct respecting matters which had no connection with the profession of an attorney or a minister from which the parties in the respective cases would be barred.[16]

Where the distinction has been thought important, as for constitutional purposes or for pur-

[16] The Court observed (p. 198): "It was held that, as many of the matters provided for in these oaths had no relation to the fitness or qualification of the two parties, the one to follow the profession of a minister of the gospel and the other to act as an attorney and counselor, the oaths should be considered not legitimate tests of qualification, but in the nature of penalties for past offences."

poses of burden of proof, the courts have held that the suspension or expulsion of a broker from doing business on a stock or commodity exchange by order of a governmental agency is a remedial measure to protect the investing public, and not a penalty. *Wright* v. *Securities & Exchange Commission,* 112 F. (2d) 89 (C. C A. 2); *Nichols & Co.* v. *Secretary of Agriculture,* 131 F. (2d) 651 (C. C. A. 1); *Nelson* v. *Secretary of Agriculture,* 133 F. (2d) 453 (C. C. A. 7).[17] *Wallace* v. *Cutten,* 298 U. S. 229, is not to the contrary, since under the Act there involved the Secretary of Agriculture could suspend only if a person "is violating" the statute. Suspension for past misconduct was therefore held unauthorized. The statute was promptly amended to permit suspension of a person who "is violating" or "has violated" the Act or regulations. The section, as amended, was construed in the *Nichols* and *Nelson* cases, *supra,* as providing for a suspension order that was remedial and not punitive.[18]

[17] The value of these cases as authority for the proposition that a suspension for past violation of the operative law is remedial and not penal is not diminished, as asserted by petitioner (see petitioner's brief, pp. 17, 19–20), by the fact that the suspension power was specifically adverted to in the statute. That has a bearing only on the question whether the power has been granted and not on its nature when exercised.

[18] The Office of Price Administration has never contended in any suit that a suspension order is a penalty. The brief of the United States Attorney in *Hamner* v. *United States,* 134 F. (2d) 592 (C. C. A. 5), does not reveal that he made such

Irrespective of the classification of the suspension order, it is submitted that Congress knew that suspension orders were being issued under the Priorities and Allocations Act as part of the allocation function, did nothing to alter the practice, and in fact affirmatively approved it by passing the Second War Powers Act. See *Perkins* v. *Brown, supra,* pp. 180–181. The administrative construction was announced to Congress by the Attorney General, who asked for the addition of penalty provisions and not their substitution for the suspension power.[19] The power has thus been conferred and confirmed by Congress.

CONCLUSION

The decision below is correct and is in accord with the only other appellate court determination and the great weight of lower court decisions. The question presented is important, and for that reason we do not oppose the petition.

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a contention (see petitioner's brief, p. 19). Both the *Hamner* and *Wilemon* opinions were written by the same Circuit Judge.

[19] See S. Rep. 989, 77th Cong., 2d sess., p. 4; H. Hearings before Committee on the Judiciary on S. 2208, 77th Cong., 2d sess., Jan. 30, 1942, pp. 10–11. The original draft of the Second War Powers Act was prepared by the Department of Justice. See Statement of Attorney General Biddle, H. Hearings before Committee on the Judiciary on S. 2208, p. 8. Title III was proposed to the Department of Justice by Mr. Donald Nelson, Chairman of the War Production Board. Ibid., p. 10.

Respectfully submitted.

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MARCH 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944